

Message Text

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AMCONSUL HONG KONG
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AMEMBASSY SEOUL
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AMEMBASSY TEHRAN

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TAGS: SNAR

SUBJECT:NARCOTICS

1. WITHIN THE LAST SEVERAL MONTHS U.S.JUDICIAL DECISIONS
HAVE CIRCUMSCRIBED THE EXPULSION OF WANTED NARCOTICS
VIOLATORS TO THE U.S. BY COOPERATING FOREIGN GOVERNMENTS.

COURTS OF APPEALS IN TWO CIRCUITS HAVE DECIDED CASES INVOLVING THE MANNER OF APPREHENSION OF INDIVIDUALS RESIDING OVERSEAS WHO HAVE BEEN INVOLVED IN INTERNATIONAL NARCOTICS CONSPIRACIES.

2. IN UNITED STATES V. TOSCANINO, 500 F.2D 267 (2D CIR. 1974), PETITION FOR REHEARING EN BANC DENIED 43 U.S.L.W. 4175 (OCT. 8, 1974), THE DEFENDANT, AN ITALIAN NATIONAL RESIDING IN URUGUAY, HAD BEEN CONVICTED OF CONSPIRACY TO IMPORT NARCOTICS INTO THE U.S. IN HIS APPEAL OF THE CONVICTION, TOSCANINO ARGUED THAT HIS PRESENCE BEFORE THE DISTRICT COURT WAS ILLEGALLY OBTAINED. IN AN OFFER OF PROOF TOSCANINO STATED THAT HE HAD BEEN KIDNAPPED IN

MONTEVIDEO BY URUGUAYAN POLICE WHO WERE PAID AGENTS OF THE USG, TAKEN TO THE URUGUAY/BRAZIL BORDER AND GIVEN OVER TO BRAZILIAN AUTHORITIES, ACTING BY PREARRANGEMENT AND IN CONCERT WITH THE U.S. AUTHORITIES. HE ALLEGED THAT THE U.S. HAD NOT MADE ANY REQUEST TO THE URUGUAYAN GOVERNMENT FOR HIS EXTRADITION, AND THAT URUGUAY WAS WITHOUT KNOWLEDGE OF THE KIDNAPPING, DID NOT CONSENT TO IT, AND CONDEMNED THIS KIND OF ACTIVITY AS ILLEGAL.

3. MOREOVER, TOSCANINO CLAIMED THAT BRAZILIAN AUTHORITIES SUBJECTED HIM TO INCESSANT AND BRUTAL TORTURE AND INTERROGATION, ALL PURPORTEDLY WITH THE KNOWLEDGE OF THE ASSISTANT U.S. ATTORNEY WHO PROSECUTED THE CASE. FINALLY, HE ALLEGED THAT HE WAS DRUGGED BY BRAZILIAN-AMERICAN AGENTS, PLACED ON AN AIRPLANE DESTINED FOR THE U.S., AND LIMITED OFFICIAL USE
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ARRESTED UPON ARRIVAL THERE BY FEDERAL AUTHORITIES WHO BROUGHT HIM IMMEDIATELY BEFORE AN ASSISTANT U.S. ATTORNEY.

4. THE USG NEITHER AFFIRMED NOR DENIED THESE CHARGES, DURING THE TRIAL, CLAIMING THEY WERE IMMATERIAL TO THE DISTRICT COURT'S POWER TO EXERCISE JURISDICTION OVER THE DEFENDANT.

5. THE COURT OF APPEALS HELD THAT TOSCANINO HAD ALLEGED A VIOLATION OF HIS CONSTITUTIONAL RIGHT OF DUE PROCESS WHICH, IF PROVED AT A HEARING ON REMAND, WOULD REQUIRE THE DISTRICT COURT TO DIVEST ITSELF OF JURISDICTION. THE COURT RECOGNIZED AND DISCUSSED THE TRADITIONAL DOCTRINE WHICH HAD BEEN DEVELOPED IN CASE LAW FROM KER V. ILLINOIS, 119 U.S. 436, (1886), THROUGH TO FRISBIE V. COLLINS, 342 U.S. 179, (1952). THOSE CASES HAD HELD THAT THE MANNER IN WHICH A DEFENDANT WAS BROUGHT WITHIN THE COURT'S JURISDICTION DID NOT AFFECT A COURT'S POWER TO EXERCISE CRIMINAL JURISDICTION OVER THE INDIVIDUAL. HOWEVER, IN TOSCANINO, THE COURT DECLARED THAT THE KER-FRISBIE DOCTRINE COULD

NOT PREVENT JUDICIAL REVIEW OF CONDUCT BY U.S. AGENTS WHICH COULD BE CHARACTERIZED AS "OUTRAGEOUS POLICE BRUTALITY AND LAWLESSNESS."

6. THE HOLDING IN TOSCANINO PRESENTED SERIOUS POTENTIAL ENFORCEMENT PROBLEMS AND THE DEPARTMENT OF JUSTICE NOTED THESE IN THE GOVERNMENT'S PETITION FOR REHEARING: "THIS CASE RAISES ISSUES OF VITAL IMPORTANCE TO THE ENFORCEMENT OF THE FEDERAL NARCOTICS LAWS. THE FACTS OF THIS CASE, AND OTHER REPORTED CASES, DEMONSTRATE THAT IMPORTATION OF HEROIN AND OTHER DANGEROUS DRUGS INTO THE UNITED STATES ARE CARRIED OUT BY FOREIGN NATIONALS OPERATING OUT OF

NUMEROUS FOREIGN COUNTRIES AND PARTICULARLY LATIN AMERICA. UNFORTUNATELY EXTRADITION TREATIES IN EFFECT WITH SOME LATIN AMERICAN NATIONS DO NOT PROVIDE FOR EXTRADITION FOR NARCOTIC OFFENSES; BUT MANY NATIONS ARE FREQUENTLY WILLING TO COOPERATE WITH THE UNITED STATES LAW ENFORCEMENT AUTHORITIES IN THE SURVEILLANCE AND APPREHENSION OF THESE CRIMINALS, ON THE CONDITION THAT THE FACT OF THEIR COOPERATION AND THEIR WILLINGNESS TO PERMIT AMERICAN LAW EN- LIMITED OFFICIAL USE LIMITED OFFICIAL USE

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FORCEMENT AGENCIES TO OPERATE ON THEIR SOIL NOT BE PUBLIC- LY ACKNOWLEDGED. A REQUIREMENT THAT THE UNITED STATES ACKNOWLEDGE OR ESTABLISH THAT A FOREIGN GOVERNMENT CO- OPERATED IN TURNING OVER A FUGITIVE WITHIN ITS JURIS- DICTION MAY VERY WELL PUT AN END TO SUCH INFORMAL CO- OPERATION WHICH HAS MADE POSSIBLE THE ARREST AND APPRE- HENSION OF NUMEROUS LARGE-SCALE INTERNATIONAL HEROIN TRAFFICKERS."

7. WITHIN TWO MONTHS OF THE DENIAL OF THE PETITION FOR REHEARING EN BANC IN THE TOSCANINO CASE, AN UNRELATED CASE INVOLVING SIMILAR ISSUES WAS DECIDED IN THE FIFTH CIR- CUIT, UNITED STATES V. HERRERA, 507 F.2D 143, (1974).

8. IN HERRERA THE DEFENDANT WAS CONVICTED OF ESCAPE FROM A U.S. PENITENTIARY. FOLLOWING HIS ESCAPE, DEFENDANT HAD MADE HIS WAY TO HIS HOME IN COLOMBIA. SOME FIFTEEN MONTHS LATER HE WAS ARRESTED BY PERUVIAN AND U.S. AGENTS WHEN THE AIRPLANE IN WHICH HE WAS A PASSENGER STOPPED TO REFUEL IN PERU. AFTER DETENTION IN PERU FOR FIVE DAYS, HERRERA WAS DEPORTED AND FLOWN TO THE U.S. IN THE COMPANY OF PERUVIAN AND AMERICAN AUTHORITIES. HE WAS ARRESTED UPON ARRIVAL IN MIAMI.

9. HERRERA'S APPEAL DID NOT DISPUTE THE FACTS RELATING TO HIS ESCAPE, BUT ATTACKED THE DISTRICT COURT'S EXERCISE OF JURISDICTION BECAUSE OF THE ILLEGALITY OF HIS ARREST IN PERU AND SUBSEQUENT DELIVERY TO THE U.S. HERRERA

ARGUED THAT THIS KIDNAPPING/ABDUCTION VIOLATED FEDERAL LAW, AND ALSO THAT THESE ACTIONS VIOLATED THE TERRITORIAL INTEGRITY OF PERU CONTRARY TO THE UN AND OAS CHARTERS. LASTLY, HE CITED THE FAILURE OF THE U.S. TO FOLLOW THE PROCEDURES FOR EXTRADITION UNDER THE U.S.-PERUVIAN TREATY. THE FIFTH CIRCUIT HELD THAT THESE CONTENTIONS WERE WITHOUT MERIT UNDER THE KER-FRISBIE DOCTRINE AND DISTINGUISHED THE HERRERA AND TOSCANINO CASES ON FACTUAL GROUNDS.

10. SLIGHTLY OVER ONE MONTH AFTER THE HERRERA DECISION, THE COURT OF APPEALS FOR THE SECOND CIRCUIT WAS GIVEN ITS FIRST OPPORTUNITY TO REEXAMINE THE SCOPE AND MEANING OF

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ITS HOLDING IN TOSCANINO, BUT WITHIN THE CONTEXT OF A FACTUAL PATTERN SIMILAR TO HERRERA. IN UNITED STATES OF AMERICA, EX REL. LUJAN V. GENGLER, ET AL., 510 F.2D 62, (1975), LUJAN, AN ARGENTINE CITIZEN, HAD BEEN INDICTED FOR CONSPIRACY TO IMPORT AND DISTRIBUTE HEROIN INTO THE U.S. AN ARREST WARRANT FOR LUJAN AUTHORIZED ANY DEA AGENT OR ANY U.S. MARSHAL TO BRING HIM BEFORE THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK. ACCORDING TO THE ALLEGATIONS OF LUJAN'S PETITION, HE WAS LURED FROM ARGENTINA TO BOLIVIA THROUGH MEANS OF A RUSE PERPETRATED BY AMERICAN AGENTS. ONCE LUJAN WAS IN BOLIVIA, BOLIVIAN POLICE, ALLEGED TO BE PAID AGENTS OF THE U.S., TOOK LUJAN INTO CUSTODY AND WITHOUT FORMALLY CHARGING HIM, HELD HIM INCOMMUNICADO FOR A PERIOD OF SEVERAL DAYS. THEREAFTER, BOLIVIAN POLICE AND AMERICAN AGENTS TRANSPORTED LUJAN TO THE LA PAZ AIRPORT AND PLACED HIM ON AN AIRPLANE BOUND FOR NEW YORK. UPON ARRIVAL IN NEW YORK, LUJAN WAS ARRESTED BY FEDERAL AGENTS.

11. LUJAN'S APPEAL ASKED THE COURT TO EXTEND ITS HOLDING IN TOSCANINO TO THE FACTUAL SITUATION OF LUJAN'S CASE. THE COURT'S OPINION LIMITED THE HOLDING IN TOSCANINO TO THE FACTS OF THAT CASE. THE COURT STATED THAT IT HAD NOT INTENDED IN TOSCANINO "TO SUGGEST THAT ANY (UNDERScoreD) IRREGULARITY IN THE CIRCUMSTANCES OF A DEFENDANT'S ARRIVAL IN THE JURISDICTION WOULD VITIATE THE PROCEEDINGS OF THE CRIMINAL COURT." (EMPHASIS ADDED) NOTING THAT LUJAN HAD CHARGED NO DEPRIVATION OF HIS RIGHTS GREATER THAN THAT TO WHICH HE WOULD HAVE BEEN SUBJECTED UNDER LAWFUL EXTRADITION PROCEDURES (WHILE ACKNOWLEDGING HIS ALLEGATION THAT THE LAW HAD BEEN VIOLATED IN THE PROCESS OF TRANSPORTING HIM TO THE UNITED STATES), THE COURT FOUND THAT THE FACTS DID NOT WARRANT NULLIFICATION OF THE INDICTMENT. THE KER-FRISBIE RULE WAS RECOGNIZED AS THE LAW. NONETHELESS, THE COURT STATED THAT IF IT WERE CONFRONTED WITH FACTS IN THE FUTURE WHICH INCLUDED VIOLATIONS OF DUE PRO-

CESS AS EGREGIOUS AS THOSE ALLEGED IN TOSCANINO, THE KER-FRISBIE RULE WOULD NOT PREVENT JUDICIAL REVIEW OF SUCH OUTRAGEOUS CONDUCT PURPORTEDLY PERFORMED BY GOVERNMENT AGENTS.

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12. THE COURT REJECTED LUJAN'S ASSERTION THAT HIS ABDUCTION VIOLATED THE CHARTERS OF THE UN AND OAS. UNLIKE TOSCANINO, LUJAN FAILED TO ALLEGE THAT THE GOVERNMENTS OF EITHER ARGENTINA OR BOLIVIA HAD OBJECTED TO HIS ABDUCTION. ABDUCTIONS OF THIS TYPE ARE HELD TO VIOLATE INTERNATIONAL LAW ONLY WHEN THE OFFENDED STATE OBJECTS TO THE CONDUCT.

13. IT SHOULD BE NOTED THAT THERE IS TO BE A FURTHER HEARING IN THE TOSCANINO CASE AT WHICH TIME THE GOVERNMENT WILL RESPOND TO TOSCANINO'S ALLEGATIONS CONCERNING, AMONG OTHER THINGS, THE METHODS BY WHICH HE WAS BROUGHT INTO THE U.S. SHOULD TOSCANINO OFFER CREDIBLE SUPPORTING EVIDENCE THAT THE ACTIONS TAKEN BY HIS ALLEGED "ABDUCTORS AND TORTURERS" WERE TAKEN BY OR AT THE DIRECTION OF THE USG AGENTS, THEN AN EVIDENTIARY HEARING WITH RESPECT TO TOSCANINO'S CLAIMS WILL BE REQUIRED. ABSENT SUCH AN OFFER BY TOSCANINO, THE DISTRICT COURT MAY DISPENSE WITH AN EVIDENTIARY HEARING ON THOSE ALLEGATIONS.

14. MANY LEGAL WRITERS REGARD THE FOLLOWING SUCCINCT STATEMENT IN JUDGE ANDERSON'S CONCURRING OPINION IN LUJAN AS A REASONABLE FACSIMILE OF CURRENT U.S. LAW ON THIS IMPORTANT SUBJECT: "...WHENEVER A FOREIGN NATIONAL IS ABDUCTED OR KIDNAPPED FROM OUTSIDE THE UNITED STATES AND IS FORCIBLY BROUGHT INTO THIS COUNTRY BY UNITED STATES AGENTS BY MEANS OF TORTURE, BRUTALITY OR SIMILAR PHYSICAL ABUSE THE FEDERAL COURT ACQUIRES NO JURISDICTION OVER HIM BECAUSE OF A VIOLATION OF DUE PROCESS. OTHERWISE THE HOLDINGS OF THE SUPREME COURT IN KER V. ILLINOIS AND FRISBIE V. COLLINS GOVERN."

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